Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners*

v.

WORLD AIRWAYS, INC., *Respondent*

BRIEF OF WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JERROLD SCOUTT, JR.
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888 Seventeenth Street, N.W.
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March 31, 1977

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OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners*

v.

WORLD AIRWAYS, INC., *Respondent*

BRIEF OF WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

World Airways, Inc. (World) submits this brief in opposition to the petition of American Airlines, Inc. and Trans World Airlines, Inc. (Petitioners) for a writ of certiorari to the United States Court of Appeals, for the District of Columbia Circuit for review of that Court's decision and judgment in *World Airways, Inc.* v. *Civil Aeronautics Board*, Case No 76-1072, entered on December 8, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which petitioners seek, is printed in Appendix II accompanying their petition and has not yet been officially reported.[1] The statement of the Civil Aeronautics Board following the issuance of that opinion, and Order 77-1-94 instituting the *Transcontinental Low-Fare Route Proceeding* (Docket 30356) in response to World's application are printed in Appendices I and II hereof, respectively.

QUESTIONS PRESENTED

The Petition accurately sets forth the single, narrow question of statutory interpretation presented to the Court of Appeals.

STATEMENT OF THE CASE

This case is unusual in one regard and one regard only—there has rarely been a Civil Aeronautics Board order that decided such a narrow legal issue. There are no questions of fact involved, and the policy questions are limited to those in the legislative history, i.e. it does not involve a statutory provision such as the "public interest" that necessarily puts the agency in a policy making role.

The "dual certification" question in a nutshell is this: supplemental, i.e. charter-only, air carriers hold their authority pursuant to Section 401(d)(3) of the Federal Aviation Act of 1958, as amended; scheduled air carriers hold their authority (which includes the right to conduct both scheduled and charter services) [2]

[1] References to the Court of Appeals opinion will be to the slip opinion, cited as "Slip Op."

[2] See Slip Op., p. 7, n. 4.

pursuant to Sections 401(d)(1) or (2); Section 401(d)(3) expressly precludes the holder of a scheduled (Section 401(d)(1) or (2)) certificate from being granted a supplemental certificate; absent any express prohibition, may a supplemental carrier be granted a scheduled certificate? A unanimous Court of Appeals panel, finding that the legislative history confirmed the plain meaning of the statute, answered this question in the affirmative.

For the convenience of the Court, and to give some balance to petitioners' rather one-sided statement of the case, World has set forth below a brief summary of the history of this proceeding.

World first filed an application for transcontinental low-fare scheduled authority in April, 1967. This was the first time that the dual certification question had ever been raised. Although it engendered a great deal of support, as well as opposition, the Civil Aeronautics Board never took any formal action and finally dismissed the application as "stale" some six and one-half years later. CAB Order 73-11-101 (1973). On April 2, 1975 World refiled the application together with a motion for an expedited hearing. On July 1, 1975 the Civil Aeronautics Board, stating that World's application merited expedition but noting that the dual certification question had not yet been resolved, [3] asked for

[3] The question was raised in 1969 in the context of the application of another supplemental carrier for an international scheduled route, but the Board declined to rule on the question choosing, instead, to deny the application on substantive grounds. *Miami-London Route Investigation*, 51 C.A.B. 100, 106, n. 22 (1969). Although a number of bills were introduced that would have clarified Section 401(d)(3) to clearly permit dual certification, prior to 1976 these bills never reached the floor of Congress. The

briefs and oral argument on that question. CAB Order 75-7-2 (1975).

The order at issue in this case, handed down on January 23, 1976, found as a matter of law that a scheduled certificate could not be issued to a supplemental air carrier. World immediately petitioned for review in the D.C. Circuit and that court issued its opinion on December 8, 1976, unanimously reversing the Civil Aeronautics Board. Nine days later the Civil Aeronautics Board issued a statement that "it would not seek further review" and "that its objective is to hear as speedily as possible World's application for authority to provide scheduled transcontinental service." See Appendix I hereof.

On January 14, 1977 the Civil Aeronautics Board by Order 77-1-94 (Appendix II hereof), formally instituted the *Transcontinental Low-Fare Route Proceeding,* Docket 30356, placed World's application at issue in that case and invited all other prospective applicants to seek consolidation. Motions to consolidate transcontinental applications have been filed by a number of companies, including two other supplemental air carriers and three scheduled air carriers. Both petitioners have moved to intervene[4] (as well as a score of

1972 Congressional testimony of the then Chairman of the Civil Aeronautics Board cited by petitioners (Petition, pp. 8-9) was delivered in the context of one of those bills and began with the predicate that the Board had not ruled on the question. Indeed, as the petitioners themselves point out (Petition, p. 9), the present Chairman testified in favor of dual certification at hearings last year. For the disposition of the bills introduced in the 94th Congress, see note 14, *infra.*

[4] Technically, the petitioners are also applicants in the case since they are seeking to put at issue certain existing restrictions on their use of satellite airports.

private and public parties). The next procedural step is an order dealing with the motions and starting the formal hearing process.

This history demonstrates in particular the dangers of regulatory lag, but it hardly reflects petitioners' image of "some 15 years of history, during which no carrier has been permitted simultaneously to hold scheduled-carrier and supplemental-carrier certificates." (Petition, p. 3) True, the statutory distinction between scheduled and supplemental air carriers has been in existence for fifteen years, but the dual certification question was not even raised until the sixth year and the Civil Aeronautics Board spent the next eight years avoiding a resolution of that question. Similar distortions or exaggerations are dealt with in the course of World's argument herein.[5]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of

[5] One point not dealt with in the argument proper concerns petitioners' gratuitous remarks concerning the size of World (Petition, p. 5), remarks *not* made to the court below. The petitioners' assertions to the contrary, revenue passenger miles are not a relevant standard for comparing scheduled and charter operations for a variety of reasons which this Court should not be burdened with. Suffice it to say that for the twelve months ended September 30, 1976, World had operating revenues of $69.9 million and the entire certificated supplemental air carrier industry had operating revenues of $417 million. The comparable figures for American and TWA were, respectively, $2.1 and $2 *billion* in operating revenues and the smallest of the "government-subsidized scheduled carriers" referenced by petitioners had operating revenues of $121.5 million. Civil Aeronautics Board, *Interim Financial Report,* (Washington, D.C., December, 1976).

Appeals does not raise an important issue of Federal Law and does not conflict with any decisions of this Court.

I. The Court of Appeals Did Not Decide an Important Issue of Federal Law. It Decided a Narrow Statutory Issue, the Resolution of Which Was Critical for World Airways and a Handful of Other Companies But a Resolution With a Relatively Minor Impact on the Overall Scheme of Federal Air Transportation Regulation.

Petitioners do not run the risk of understatement in their argument that the certiorari jurisdiction of this Court should be invoked because there is an important issue of Federal law involved:

> "... regardless of whether the lower court's interpretation is correct, there can be no question that it alters a basic element of the statutory scheme for regulating air transportation, far transcends the particular facts of the present case, and involves continuing problems in the administration of a key federal statute."[6]

Contrast petitioners' hyperbole with the calm analysis of an unanimous Court of Appeals panel:

> "At the outset, it is important to note the narrowness of the question before us. We are asked merely to decide whether the Board is statutorily foreclosed from considering a supplemental carrier's application for scheduled authority. The absence of a statutory bar does not mean, of course, that a supplemental carrier is entitled to scheduled authority. It does mean that its application for such authority is to be evaluated on its merits, with due consideration to be given to all relevant aspects of the public interest, including the applicant's responsibilities as a supplemental carrier." (Slip. Op. pp. 5-6).

[6] Petition, at 12.

The question decided by the court below was not only narrow in a legal sense, i.e., the court found that the legislative history supported the plain meaning of Section 401(d)(3), it was also very narrow in terms of its policy and factual implications. At most, the court's ruling means that World and the seven other certificated supplemental air carriers can now apply for scheduled certificates—and prior to the court's ruling, they were the *only* persons in the United States to whom that privilege was denied.[7] The immediate result of the ruling is that the Civil Aeronautics Board is free to proceed with World's application for transcontinental authority, and it has done just that by choosing not to seek further review of that ruling and by instituting the *Transcontinental Low-Fare Route Proceeding* in Docket 30356. See Appendices I and II hereof. That proceeding is of considerable significance to World, of course, and it will (hopefully) expand the availability of transcontinental air transportation, but it does not alter the basic scheme of Federal air transportation regulation one whit.

The core of petitioners' argument is that since this Court granted certiorari twenty-seven years ago in a

[7] Petitioners point out that while the court's ruling permits supplemental air carriers to hold dual certificates, scheduled air carriers are still barred from holding supplemental certificates by Section 401(d)(3). As correctly noted by the court below, this is nothing more than a question of semantics since scheduled air carriers are actually "hybrid" carriers, i.e. scheduled certificates convey *both* scheduled and charter authority. (Slip Op. p. 7, n. 4). In briefing the case to the court below, World cited Civil Aeronautics Board statistics which show that more than one-half of all U.S. air charter revenues are generated by scheduled air carriers, and the largest domestic and international charter operators are, respectively, United Airlines, and Pan American World Airways.

case involving an interpretation of Section 401(d), *CAB* v. *State Airlines*, 338 U.S. 572 (1950), it should do so here. The *State Airlines* case is distinguishable for a number of reasons: it was decided when Federal air transportation regulation was still in its infancy; the issue presented—namely, whether the Civil Aeronautics Board could award routes to a carrier other than those described in the carrier's application—was of genuine long-term significance to Federal regulation; the decision of the court below, reversing the route award, severely restricted the Civil Aeronautics Board's decisional flexibility; and the Civil Aeronautics Board was the petitioner. Not one of those circumstances is present in this case.

Petitioners' reliance on the *State Airlines* case in support of its certiorari argument is particularly ironic since the substantative teaching of that case, namely, that "rigid constraints on the Board's ability to consider applications on their merits are generally disfavored" (Slip Op. p. 6), is a central part of the lower court's decision in this case. In truth, petitioners had nowhere else to look for support.

The last time this Court granted certiorari in a case involving an appeal from a Civil Aeronautics Board decision was in 1968, and that was occasioned by a direct conflict among the circuits.[8] Indeed, excluding that case and *State Airlines,* this Court has granted certiorari on only seven other occasions in the thirty-

[8] *World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 461, *reh. denied,* 393 U.S. 957 (1968), aff'g. *Pan American World Airways, Inc.* v. *CAB,* 380 F.2d 770 (2nd Cir. 1967). The D.C. Circuit had reached precisely the opposite result in *American Airlines, Inc.* v. *CAB,* 365 F.2d 939 (D.C. Cir. 1966).

nine year history of the Civil Aeronautics Board.[9] Even more instructive are the cases in which this Court has denied certiorari.[10] In the last two years alone, this Court has denied certiorari in cases involving: the right of passengers to recover fares that were raised unlawfully; the meaning of "competition to the extent necessary" in Section 102, which is the basic Congressional mandate; the reviewability under Section 1006 of a Presidentially approved order that, arguably, was issued illegally; and approval under Section 412 of the Mutual Aid Pact and its consistency with national labor policy and the Railway Labor Act.[11] These cases put petitioners' argument in perspective.

[9] *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961), determining the Board's statutory authority to modify a certificate after its effective date and without notice and hearing; *American Airlines, Inc.* v. *North American Airlines, Inc.*, 355 U.S. 465 (1958) and *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956), interpreting the meaning of "public interest" in Section 411; *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74 (1954) and *Western Air Lines* v. *CAB,* 347 U.S. 67, *reh. denied* 347 U.S. 924 (1954), determining the boundaries of the Board's subsidy authority under Section 406(b); *Eastern Air Lines* v. *C.A.B.*, 341 U.S. 901 (1951), a *per curiam* decision granting certiorari and vacating the case as moot; and *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), determining the scope of the President's powers under Section 801 and establishing that all Presidentially approved orders are immune from judicial review.

[10] This Court has denied certiorari in sixty-one cases involving an appeal from a Civil Aeronautics Board order, beginning with *Cameron* v. *CAB,* 323 U.S. 716 (1944).

[11] *Moss* v. *CAB,* 521 F.2d 298 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 966 (1976); *Continental Air Lines, Inc.* v. *CAB,* 519 F.2d 944 (D.C. Cir. 1975), *cert. denied* 424 U.S. 958 (1976); *Diggs* v. *CAB,* 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied* 424 U.S. 910 (1976); *Air Line Pilots Association International* v. *CAB,* 502 F.2d 453 (D.C. Cir. 1974), *cert. denied* 420 U.S. 972 (1975).

In the final analysis, petitioners are asking this Court to make an exception to the general principle that certiorari jurisdiction will "be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers and Co.*, 240 U.S. 251, 258 (1915) (citations omitted). This is simply not such a case.

II. The Court of Appeals Decision Does Not Conflict With the Principle That Judicial Deference Is Owed an Administrative Construction of a Statute. That Principle Is Simply Inapplicable in This Case.

When the Civil Aeronautics Board dismissed World's application on the grounds that Section 401 (d)(3), by implication rather than by its plain meaning, prohibits a supplemental carrier from acquiring scheduled authority, it was the first and only time that the Board has ruled on this question. Petitioners' argument that the court below failed to accord proper deference to the Board's construction of the statute is tantamount to an argument that *de novo* statutory interpretations by administrative agencies should be immune from judicial review. The plain truth is that deference is not owed to the Board's interpretation, either by the court below or by this Court.

The principle of judicial deference may well be "venerable" as petitioners contend, but it has far from general applicability. This Court has clearly defined the circumstances under which deference to an administrative construction of a statute is appropriate, and not one of those circumstances is present in the instant case.

First, the agency construction must involve an area of its presumed expertise, an area of administrative

policy rather than a "narrow legal issue . . . peculiarly reserved for judicial resolution". *Piper* v. *Chris-Craft Industries, et al.*, 45 U.S.L.W. 4182, 4193, n 27 (U.S. February 23, 1977); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). The two cases chiefly relied upon by petitioners, *Red Lion* and *Columbia Broadcasting*,[12] provide an example of the type of situation in which the broad scope of the question framed,[13] necessitated the application of agency expertise and the principle of judicial deference. The case presented to the court below, however, involves a narrow question of statutory construction that begins with the literal meaning of Section 401(d)(3), a meaning that is both clear and unambiguous. In such circumstances expertise rests with the courts, not with the Civil Aeronautics Board, and the principle of deference is inapplicable. See *Shea* v. *Vialpando*, 416 U.S. 251, 262, n. 11 (1974).

The second circumstances giving rise to judicial deference is when "an agency has rendered binding, consistent, official interpretations of its statute over a long period of time". *Piper* v. *Chris-Craft, supra*, 45 U.S.L.W. 4193, n. 27 (citations omitted); *Chemehuevi Tribe of Indians* v *FPC*, 420 U.S. 395, 409-410 (1975) This is particularly true when the administrative interpretation is adopted soon after passage of the legislation. See *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). The stat-

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[12] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973).

[13] At issue in both of these cases was the meaning of the term "public interest" as used in the Communications Act. (Tit. III, 48 Stat. 1081, as amended, 47 U.S.C. § 301 *et seq.*)

utory provision at issue in the court below was enacted in 1962. The one and only interpretation of that provision by the Civil Aeronautics Board was that contained in Order 77-1-88, decided on January 23, 1976.

The only other circumstance appropriate for judicial deference is when there is evidence of Congressional acquiesence in the administrative construction. See *Red Lion Broadcasting* v. *FCC, supra,* 395 U.S. at 381; *Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965). Although the petitioners make a passing reference to the attempts to resolve the so-called "dual certification" question in the last Congress, they do not, and could not, seriously allege that Congress in any way acquiesced in the Civil Aeronautics Board's construction of Section 401(d)(3).[14]

In sum, no deference is owed the Civil Aeronautics Board's construction of Section 401(d)(3), and the court below properly refused to give such deference.[15] Indeed, if the court below had accorded deference to that construction, the resulting "judicial inertia"

[14] The petitioners note that proposed dual certification legislation was not enacted, dying when the 94th Congress adjourned *sine die.* (Petition, p. 9). They fail to point out that dual certification bills actually passed in both the Senate and House as part of measures which included other unrelated legislative proposals; and that when, on October 1, 1976, conference agreement on these other proposals could not be reached, the Congress adjourned without taking final action.

[15] Petitioners also chide the court below for failing to even discuss the deference issue. Suffice it to say that the D.C. Circuit has particularlized the factors underlying the doctrine of deference, and when, as here, those factors are not present, "the maxim of deference must inevitably bow before the principle of judicial supremacy in matters of statutory construction." *Wilderness Society* v. *Morton,* 479 F.2d 842, 866 (D.C. Cir.) *cert. denied* 411 U.S. 917 (1973).

would have frustrated the entire review process. See *Volkswagenwork Aktiengesellschaft* v. *FMC,* 390 U.S. 261, 272 (1968), and cases cited therein.

CONCLUSION

From the foregoing it is apparent that there are no serious issues or conflicts posed by this case which warrant this Court's time and attention. None of the important reasons traditionally required by this Court for taking review on writ of certiorari is present. This case is remarkable only for the narrowness of the legal issue and the amount of uncertainty generated by a statutory provision which on its face has not a shred of ambiguity. The unanimous decision of the court below has dispelled the uncertainty and the Civil Aeronautics Board has indicated its agreement with that decision.

WHEREFORE, Respondent respectfully requests the writ of certiorari be denied.

Respectfully submitted,

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March 31, 1977

APPENDIX

APPENDIX I

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

FOR RELEASE:

ON OR AFTER
Friday
December 17, 1976
CAB 76-205

Contact: Alan M. Pollock
202/673-5990

Statement of CAB Regarding World Airways Pending Application

WASHINGTON, D. C. (December 17)—The Civil Aeronautics Board today said it would not seek further review of the December 8, 1976 decision of the U.S. Court of Appeals for the D.C. Circuit in *World Airways, Inc.* v. *C.A.B.* The Court held in that case that the Board is not foreclosed by the Federal Aviation Act from considering applications by supplemental carriers for regular scheduled route authority.

The Board said that its objective is to hear as speedily as possible World's application for authority to provide scheduled transcontinental service. In the event that other parties to the litigation seek further review of the Court's decision, the Board will, if necessary, request leave of the Court to proceed with a hearing on the merits of World's application while the legal issue is being finally resolved.

APPENDIX II

Order 77-1-94

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 14th day of January, 1977

Docket 30356

Transcontinental Low-Fair Route Proceeding

Docket 27693

Application of WORLD AIRWAYS for a certificate of
public convenience and necessity

Order

By Order 75-7-2, July 1, 1975, the Board announced that it would set the application of World Airways in Docket 27693 for expedited hearing, if it first found that the Federal Aviation Act does not prohibit supplemental air carriers from acquiring scheduled authority. After briefs and oral argument on this threhold question, the Board in Order 76-1-88, January 23, 1976, determined that it did not have the legal authority to issue a route certificate to a supplemental air carrier without requiring the surrender of the carrier's supplemental authority. Accordingly, World's application was dismissed. The applicant appealed and on December 8, 1976, the United States Court of Appeals for the District of Columbia Circuit reversed Order 76-1-88 and remanded the case for hearing.

With the threshold impediment removed, the application is hereby set for expedited hearing as announced in Order 75-7-2. Like the *Chicago Midway Low-Fare Route Proceeding* recently set for hearing in Docket 30277,[1] this case is also unique and complex but its implications are somewhat different from those of *Chicago Midway*. We have, therefore, decided to follow similar procedures by issuing a second order which will (a) define the scope of the proceeding, and (b) designate the route and rate issues to be resolved, including the relationship of World's fare proposal to the requirements of the *Domestic Passenger Fare Investigation*.[2]

In order to expedite the case and eliminate any unnecessary procedural steps, all other applications, motions to consolidate and comments regarding this order must be filed within 30 days of the service date of this order. Answers to motions filed pursuant to this directive will be due 14 days thereafter. Environmental evaluations pursuant to Part 312 of the Procedural Regulations shall be filed by World and any other applicant for authority within 90 days of the date of service of this order.

ACCORDINGLY, IT IS ORDERED THAT:

1. A proceeding to be known as the *Transcontinental Low-Fare Route Proceeding*, Docket 30356, be and it hereby is instituted and set for hearing before an administrative law judge of the Board at a time and place to be designated hereafter;

2. The application of World Airways, Inc. in Docket 27693 be and it hereby is restored to its place on the Board's

---

[1] Order 76-12-149, December 28, 1976.

[2] A staff evidence request will be appended to the order and the parties will be directed to submit comments thereon prior to the prehearing conference. All parties will be free to seek modification or expansion of the request. Because of the need in this case for further expert analysis of the facts and legal issues, no staff component will become a party to the proceeding until the second order has been issued.

docket and consolidated for hearing with the proceeding instituted by paragraph 1 above;

3. Applications, motions to consolidate and comments regarding this order shall be filed within 30 days of the service date of this order;

4. Answers in response to pleadings filed pursuant to paragraph 3 above shall be filed within 14 days thereafter;

5. World Airways and any other applicant for authority shall file an environmental evaluation within 90 days of the service date of this order; and

6. A copy of this order shall be served upon all parties in Docket 27693.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)